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IN THE

Supreme Court of the United States

October Term—1953

No. 518

VINCENZO PANEBIANCO,

Petitioner,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

HENRY G. SINGER,
Attorney for Petitioner.

32 CASH PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, VINCENZO PANEBIANCO, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 4, 1953. (See Appendix to Brief.)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1), Rule 37(b)(2) and Rule 45(a) of the Federal Rules of Criminal Procedure.

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals has not yet been officially reported. It fully appears on pages 21 to 23 of the Appendix to this Petition and Brief.

STATEMENT OF THE MATTERS INVOLVED

The judgment of the Court of Appeals sought to be reviewed affirmed petitioner's conviction and sentence on a plea of "guilty" to an indictment charging conspiracy to violate the narcotic laws (26 U. S. C. Sections 2553(a) and 2554(a), and 21 U. S. C. Sections 173 and 174), and the denial of petitioner's motion in the District Court before sentence to withdraw his plea of "guilty" and to interpose therefor a plea of "not guilty."

The indictment, under which petitioner was charged, named six other defendants and contained thirteen counts (pp. 10-20). Petitioner was named in only one count, *viz.*, the conspiracy count. The overt acts alleged consisted of four meetings by petitioner with the other alleged co-conspirators in the City of New York. Each meeting, *per se*, was innocent in character. The twelve other counts in the indictment, in which petitioner was not named, set forth substantive offenses involving the possession and sale of narcotics.

Upon his arraignment on February 11, 1953, petitioner pleaded "not guilty" (p. 2). The case was set down for trial and on April 29, 1953 petitioner appeared for trial before Honorable Irving R. Kaufman, District Judge (pp.

"p" references are to pages in the Transcript of Record, except where otherwise noted.

21-23). Petitioner was represented by counsel. At that time, petitioner advised the Court, through his counsel, that he wished to withdraw his plea of "not guilty" and to enter a plea of "guilty." The Court, after asking petitioner four perfunctory questions as to his understanding of the application and its voluntariness, consented to the entry of the guilty plea. Sentencing was adjourned pending the submission of a pre-sentence report.

On June 15, 1953 petitioner appeared for sentencing before Honorable Sylvester J. Ryan, District Judge, who was then presiding at a Criminal Term of the United States District Court for the Southern District of New York. At the call of the calendar, petitioner, through counsel, advised the Court, that he wished to withdraw his plea of "guilty" and to enter a plea of "not guilty." Petitioner stated to the Court that he was innocent of the charge and wanted a trial by jury. Judge Ryan refused to hear petitioner's oral application and adjourned the matter for one week to enable petitioner, by other counsel, to make a written application for the change of plea (pp. 36-40).

On June 24, 1953 petitioner, by his present counsel Mr. Singer, who had been retained in the interim, appeared before Judge Ryan with a written application to change his plea from "guilty" to "not guilty" (pp. 24-28). Counsel and petitioner advised the Court that petitioner was innocent of the charge of conspiracy; that he had entered a plea of "guilty" because of ignorance of the nature of the crime of conspiracy; that he had pleaded "guilty" on the advice of his former attorney that because a narcotics violation was involved, he would have little chance

of gaining an acquittal regardless of his innocence (pp. 27, 37, 42).

Judge Ryan permitted the Government's attorney on oral argument of the motion to enumerate petitioner's prior criminal offenses (pp. 43-45). The latter consisted of minor violations of the Penal Laws of the State of New York, all committed while petitioner was a youth and were wholly unrelated to crimes involving narcotics.

Although the Government made no showing that it would be prejudiced by a change of plea and although the application was made before sentencing, Judge Ryan, without holding a hearing as to the circumstances surrounding petitioner's original plea of "guilty", denied petitioner's motion and thereupon sentenced him to a term of imprisonment of four years and the payment of a $10,000.00 fine (p. 48).

The Court of Appeals in affirming the conviction held that the sole issue was one of discretion of the trial court and that Judge Ryan had not committed an abuse of discretion in denying petitioner's motion (Appendix).

QUESTIONS PRESENTED

1. Did the denial of petitioner's application to change his plea from "guilty to "not guilty" constitute an abuse of discretion by the District Court where (a) petitioner (1) maintained his innocence, (2) asserted that his plea of "guilty" was based in part on his ignorance of the nature of the crime of conspiracy, (3) asserted that he pleaded "guilty", although innocent, on the advice of his attorney that he could not be acquitted in a narcotics

case; (b) where the application was made before sentencing; (c) where the Government failed to show prejudice; (d) where no hearing, as to the reasons prompting petitioner's original plea of "guilty" was held; (e) where the District Court, in deciding the motion, heard and considered evidence of petitioner's prior convictions totally unrelated to the crime for which he stands convicted?

2. Did the denial of petitioner's application under the circumstances set forth above violate petitioner's constitutional right to a trial by jury?

REASONS FOR GRANTING THE WRIT

1. This case involves one of man's fundamental rights, the right to trial by jury. This right has been zealously guarded by this Court (*Glasser* v. *U. S.*, 315 U. S. 60, 67). It is of overwhelming importance not only to the petitioner but also to the public that this Court should determine whether a man may be deprived of his liberty, under the circumstances presented by this case, without a trial by his peers.

2. The sound administration of criminal justice requires, for the guidance of the District Courts and of the bar, an interpretation by this Court of

a. Rule 11 of the Rules of Criminal Procedure as to the safeguards and procedure to be adopted by the trial court in accepting a plea of guilty;

b. Rule 32(d) of the Rules of Criminal Procedure as to the conditions under which a plea of guilty may be withdrawn before sentencing.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceeding in said Court herein, being the case numbered and entitled in its docket as "United States of America v. Vincenzo Panebianco, App. No. 89, Docket No. 22830, October Term, 1953" and that the judgment of said Court be reviewed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, December 29th, 1953.

VINCENZO PANEBIANCO
Petitioner

By HENRY G. SINGER
Attorney for Petitioner

ARNOLD D. ROSEMAN and
GEORGE M. LEHR,
with him on the Petition

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, December 29th, 1953.

HENRY G. SINGER
Attorney for Petitioner and a Member of the Bar of this Court

IN THE

Supreme Court of the United States

October Term—1953

No.

VINCENZO PANEBIANCO,

Petitioner,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

Statutes Involved

Rule 32(d) of the Federal Rules of Criminal Procedure reads as follows:

> "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Statement of Facts

Petitioner was indicted on one count charging a conspiracy to violate the narcotics law. Upon his arraignment he pleaded "not guilty". Approximately two and a half

months later when the case was reached for trial, petitioner, through counsel, advised the District Judge, Hon. Irving R. Kaufman, that he wished to withdraw his plea and interpose a plea of "guilty". Judge Kaufman asked petitioner four brief questions concerning the voluntary character of his change of plea and thereupon permitted the entry of the substituted plea of "guilty". Sentence was adjourned.

Six weeks later petitioner appeared for sentencing before Hon. Sylvester J. Ryan. At that time petitioner's then attorney advised the Court that petitioner, convinced of his innocence, wished to withdraw his plea of "guilty" and enter a plea of "not guilty". *Petitioner personally protested his innocence to the Court* (p. 39). Judge Ryan refused to hear the oral application and adjourned sentencing to permit petitioner to make a written motion for the same relief.

On the adjourned date, petitioner, through his new and present counsel, made written application for permission to change his plea to "not guilty". Both the motion papers and the oral argument reveal that the bases for petitioner's application were his innocence of the charge of conspiracy, his ignorance of the nature of the charge against him which in part prompted his original plea of "guilty" and the advice of his former attorney that in a narcotics case he had little chance of being acquitted and that he had better plead "guilty" regardless of his personal belief of his innocence (pp. 27, 37, 42).

Judge Ryan permitted the Government on the oral argument to introduce evidence of petitioner's prior convictions. Parenthetically, these skirmishes with the law were

all misdemeanors and committed during petitioner's adolescence. Although the Government failed to show any prejudice to its case if petitioner's motion were to be granted and a trial by jury to be had, Judge Ryan, without any further hearing, denied petitioner's application and immediately sentenced him to four years imprisonment and a fine of $10,000.00.

ARGUMENT

I.

The denial of petitioner's application to change his plea to "not guilty" constituted an abuse of discretion.

Rule 32(d) of the Federal Rules of Criminal Procedure permits the withdrawal of a plea of "guilty" and the substitution of a plea of "not guilty". Assuming for the purposes of argument that the determination of an application to that purpose is merely a matter for the discretion of the trial court and does not involve any constitutional issues, the exercise of that discretion becomes a question of law and is subject to appellate review for abuse.

> *Friedman* v. *U. S.* (8th Cir.), 200 F. (2) 690;
> *Williams* v. *U. S.* (5th Cir.), 192 F. (2) 39.

This Court, in *Kercheval* v. *U. S.*, 274 U. S. 220, 223-4, propounded certain general rules to be observed in passing upon applications for the withdrawal of a plea of guilty.

> "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound.

> * * * But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence * * *. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

The Courts of Appeals for the various Circuits have consistently followed these rules and language and at the same time have expanded and refined them.

See:

Friedman v. *U. S., supra,* p. 696;
Williams v. *U. S., supra,* pp. 39-40.

The standards are clear; their application, especially in an area as illusive as judicial discretion, difficult. Whether a trial court has been guilty of an abuse of discretion demands an analysis of all the relevant factors in each case. It is submitted that upon analysis herein, Judge Ryan's denial of petitioner's motion to withdraw his plea of guilty, constituted an abuse of discretion.

The record clearly shows that petitioner was vehement in his insistence of his innocence of the charge against him. On February 11, 1953 he pleaded "not guilty" to the indictment. When he changed his plea to "guilty" on April 29, 1953, he still protested his innocence almost contemporaneously to the probation officer upon the presentence investigation (p. 48). He asserted his innocence again before Judge Ryan orally on June 15, 1953 and both

orally and in sworn affidavits before Judge Ryan on June 24, 1953.

Petitioner has consistently maintained his innocence throughout the entire proceeding except for the plea of guilty before Judge Kaufman. That plea will be discussed below. In taking that position, petitioner has met the minimum requirement for a withdrawal of a plea of guilty. (*U. S.* v. *Nostrand Corp.* (2nd Cir.), 168 F. (2) 481, 482; *Roberto* v. *U. S.* (7th Cir.), 60 F. (2) 774, 775.)

Petitioner's constant reiteration of his innocence certainly demanded a more sympathetic response from the trial court rather than a lengthy term of imprisonment without a trial.

> "In any event, my conscience will not permit me to be a party to sending a man to the penetentiary upon a plea of guilty when he insists that he did not commit the acts constituting guilt" (*U. S.* v. *Lias* (4th Cir.), 173 F. (2) 685, 687).

The record is equally clear that petitioner's plea of guilty on April 29, 1953 was in part motivated by his ignorance of the complex nature of a conspiracy—the sole charge against him in the indictment—and of the proof required to convict him. Petitioner was under the mistaken impression that proof of his meetings with the other alleged co-conspirators—the overt acts set forth in the conspiracy count—was sufficient to convict even though the subject matter of the meetings did not concern narcotics' violations (p. 35). Such ignorance of the nature of the charge against him and the proof required to convict, more than meets the criteria of "inadvertence", "ignorance" and "mistake".

In *Bergen* v. *U. S.* (8th Cir.), 145 F. (2) 181 the Court of Appeals reversed a denial of defendant's motion to withdraw his plea of guilty, where defendant had been indicted for conspiracy to violate the Frazier-Lemke Act and had believed that proof of the overt acts alleged was sufficient to convict him of the crime of conspiracy. Petitioner herein labored under the same delusion and should receive the same relief especially in view of the other elements presented by the record.

Where a plea of guilty is motivated by fear, the cases are legion that a defendant should be allowed to withdraw the plea. It is submitted that the record shows that petitioner's plea of guilty was prompted in part by his fear of going to trial created by his then attorney's advice that, in a narcotics case, he would have small chance of gaining an acquittal.

We are not concerned here with the correctness of the advice of counsel but with its effect on the petitioner and his reasonable reliance on that advice. (*U. S.* v. *Shneer* (3rd Cir.), 194 F. (2) 598.) It is fair to presume that petitioner was impressed by his attorney's opinion and that it conjured up fear of convction with the attendant consequences. This Court can take judicial notice of the vilification to which narcotics violators have been subjected in the press and the public outrage in response thereto. At that time, petitioner's fear of a public trial in the light of that background and the blandishments of counsel certainly was enough to overcome his personal belief of his innocence and to cause him to yield in his desire to continue his plea of "not guilty". That factor alone should have entitled petitioner to withdraw his

guilty plea and to return to the status he had prior to being subjected to the importunities of counsel. (*State* v. *Nicholas,* 46 Mont. 470; *People* v. *McCrory,* 41 Cal. 458.)

It is important to note that petitioner's application to withdraw his plea was made before sentencing. Thus petitioner is not obliged to show "manifest injustice," although the record clearly establishes that. The fact that the application was made before sentencing rules out any charge that petitioner was motivated by disappointment and chagrin on receiving a sentence more severe than that anticipated on a plea of guilty. This too, is not a case where a defendant is motivated by hopes of leniency and then discovers that he has been the victim of what he believes to be his own folly. (*cf. Williams* v. *U. S.* (5th Cir.), 192 F. (2) 39; *Stidham* v. *U. S.* (8th Cir.), 170 F. (2) 294.) Indeed, this is the case of a man who steadfastly clung to his avowal of innocence and through ignorance and fear entered a plea of guilty.

It is submitted that Judge Ryan's failure to accord petitioner a hearing on the circumstances surrounding his plea of guilty and his desire to withdraw that plea was a denial to petitioner of the minimum relief to which he was entitled. (*U. S.* v. *Hayman,* 342 U. S. 205.) This is especially true in view of the fact that he permitted the Government on argument of the motion to offer proof of petitioner's prior convictions—evidence which was damaging to the petitioner and of persuasive effect upon Judge Ryan (p. 45). Indeed, the Court of Appeals yielded to such persuasion (p. 23, Appendix). However, petitioner's convictions were all minor in nature—misdemeanors—committed during his adolescence. The least that petitioner should have been accorded was a hearing in

the District Court to enable him to introduce in support of his motion, evidence strong enough to overcome the hostile impression created by the revelation of his prior convictions, minor though they may have been. A reading of all the cases involving applications to withdraw a plea of guilty reveals that it is fairly standard practice for the trial court to direct a hearing on the application so that all the facts will be before the Court in arriving at its decision. (*cf. U. S.* v. *Shneer* (3rd Cir.), 194 F. (2) 598.)

At such a hearing the proceedings before Judge Kaufman on April 29, 1953 when the plea of guilty was entered, would have been subject to scrutiny. The record reveals that Judge Kaufman directed four perfunctory questions (one repetitive) to the petitioner concerning his understanding of a plea of guilty and the voluntariness of its origin (p. 22). No attempt was made by Judge Kaufman to ascertain whether petitioner fully understood the nature of the charge against him and the facts on which it was founded. Perhaps if such inquiries had been made of petitioner at that time, his erroneous conception of a charge of conspiracy might have been discovered and rectified and his plea of guilty never entered.

Rule 11 of the Federal Rules of Criminal Procedure makes it mandatory that a plea of guilty shall not be accepted "without first determining that the plea is made voluntarily with understanding of the nature of the charge." The Court is charged with the duty of seeing that a defendant understands the nature of the charge, the effect of a guilty plea and knows the facts on which the charge and plea are founded. (*Fogus* v. *U. S.* (4th Cir.), 34 F. (2) 97; *Nicely* v. *Butcher*, 81 W. Va. 247; see also Note of the Advisory Committee in Federal Code

Annotated, Volume "Rules of the Various Federal Courts", p. 13.)

The proceedings before Judge Kaufman should have been considered by Judge Ryan. His failure to do so constituted an abuse of discretion.

Finally, it should be pointed out that the Government made no claim to or showing of prejudice before Judge Ryan although the latter speculated that an inference of prejudice might be drawn (p. 45). However, nowhere in the record is there any statement or showing by the Government that it would be unable to try petitioner at a trial.

In light of all the above circumstances, it is submitted that the exercise of sound judicial discretion called for the granting of petitioner's application to withdraw his plea of "guilty" and to have his day in court before a jury of his peers.

> "Such a motion should never be denied where the ends of justice would be best served by granting it" (*Williams* v. *U. S.* (5th Cir.), 192 F. (2) 39, 40.)

In failing to give proper weight to the various factors enumerated above, the Court of Appeals was in error. This application by petitioner was not frivolous; it was of paramount importance to him. A man's liberty is at stake. It should not be bartered away lightly. It is submitted that the record herein presents many reasons—not one—why the granting of petitioner's application should have seemed *"fair and just"* (*Kercheval* v. *U. S.*, 274 U. S. 220, 224). In finding to the contrary, the Court of Appeals held that the *Kercheval* requirements had been

met. A reading of the record herein inexorably compels a different conclusion.

II.

The denial of petitioner's application violated his constitutional right to a jury trial.

In addition to being an abuse of judicial discretion, it is submitted that the denial of petitioner's application to withdraw his plea of guilty under the circumstances set forth in the record, was tantamount to a denial of petitioner's right to a jury trial guaranteed to him by the Sixth Amendment.

That the denial of such an application may amount to a deprivation of a Constitutional right, has been recognized. (*Farnsworth* v. *Zerbst* (5th Cir.), 98 F. (2) 541, 543; *Farnsworth* v. *Sanford* (5th Cir.), 115 F. (2) 375, 376.)

In Point I of this brief *supra,* mention was made of the proceedings before Judge Irving R. Kaufman on April 29, 1953 when petitioner entered his plea of guilty. It was there pointed out that the District Judge had failed to observe the mandatory requirements of Rule 11 of the Federal Rules of Criminal Procedure governing the acceptance of a plea of guilty. No attempt was made by Judge Kaufman to determine that petitioner understood the nature of the charge against him and the facts upon which the charge was founded. Four brief questions were asked. No explanation was given. In a space of a few brief seconds petitioner ostensibly waived his right to a jury trial.

This Court has on many occasions considered the validity of a waiver of constitutional rights and has declared that "courts indulge every reasonable presumption against waiver" of such rights (*Aetna Ins. Co.*, v. *Kennedy,* 301 U. S. 389, 393.)

In *Patton* v. *U. S.,* 281 U. S. 276, this Court dealt specifically with the waiver of a jury trial. It laid down the general rules to be observed in determining the validity of such a waiver. It was written:

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof,

> and with a caution increasing in degree as the offenses dealt with increase in gravity" (p. 312).

Applying the tests of the *Patton* doctrine to the case at bar, it is apparent that petitioner's waiver of a jury trial was invalid. Petitioner's "intelligent consent" was lacking. He was ignorant of the nature and proof of a charge of conspiracy. His consent was based in part on fear. His plea of guilty was accepted by the trial court "as a mere matter of rote." There was no clear determination by Judge Kaufman that petitioner's waiver was intelligently and competently made. (*Johnson* v. *Zerbst*, 304 U. S. 458, 465.) *A fortiori*, where the violation of Rule 11 has subsequently been brought to the attention of the District Court and the Court of Appeals, the petitioner's application should have been granted.

Where as here the waiver of a jury trial was based on ignorance and fear and the trial court did nothing to allay them, it is submitted that the plea of guilty should be set aside and petitioner allowed to enter a plea of "not guilty" and be tried by a jury. Otherwise "the guaranty [of the Constitution] would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." *Johnson* v. *Zerbst*, *supra*, page 465.

That the denial of petitioner's application was tantamount to the denial of a right to a jury trial is enhanced by the other circumstances in the record which were analyzed in detail in Point I of this brief, *supra*. To hold that a man who has unequivocally and steadfastly maintained his innocence, who pleaded guilty in ignorance and fear, who was denied a full hearing and who has not preju-

diced the Government, must go to jail for four years without an opportunity to defend himself is to deny that man his constitutional rights and his day in court.

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt" (*Glasser* v. *U. S.*, 315 U. S. 60, 67).

The Court of Appeals found that Judge Kaufman "was careful to make sure that the defendant was acting voluntarily and without the influence of fear or promises of a lighter sentence" (p. 23, Appendix). Assuming that four short questions and answers justify such a conclusion—which is doubtful—the Court of Appeals still failed to consider the requirement of Rule 11 that a plea of guilty must be based on an "understanding of the nature of the charge". That is mandatory. Judges Kaufman and Ryan ignored it. The Court of Appeals ignored it. In so doing the Court of Appeals condoned such error.

The Court of Appeals was likewise in error stating that "there is no suggestion that he was ignorant of the consequences of his plea" (p. 23, Appendix). The record is replete with avowals by petitioner of his ignorance of the nature of a conspiracy (pp. 35, 42, 48). A plea of guilty touches every phase of an indictment. Ignorance of the crime necessarily entails ignorance of the consequences of a plea to such crime.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

HENRY G. SINGER,
Attorney for Petitioner.

ARNOLD D. ROSEMAN and
GEORGE M. LEHR,
with him on the brief.

APPENDIX

OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 89—October Term, 1953.

(Argued November 9, 1953 Decided December 4, 1953.)

Docket No. 22830

UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENZO PANEBIANCO,

Defendant-Appellant.

Before:

SWAN, FRANK and MEDINA,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Ryan, *Judge.*

This is an appeal from conviction and sentence on plea of "guilty" to an indictment charging conspiracy to violate the narcotic laws, a motion before sentence to change the plea having been denied. Affirmed.

HENRY G. SINGER, *Attorney for appellant;* Harry Silver, with him on the Brief.

J. EDWARD LUMBARD, United States Attorney, *for appellee;* Leon Silverman, Assistant United States Attorney, of Counsel.

Appendix

PER CURIAM:

The appellant, with others, was indicted by a grand jury and charged with the crime of conspiracy to violate the narcotic laws. He originally pleaded "not guilty." When the case was called for trial he appeared with counsel before Judge Irving R. Kaufman and, after interrogation by the court, changed his plea to "guilty." A pre-sentence report was ordered and sentence was adjourned. Six weeks later, on the day set for sentence, the defendant appeared with the same counsel before Judge Ryan, and counsel stated that the defendant had informed him "this morning" that he is not guilty and desires to withdraw his plea.[1] Judge Ryan adjourned sentence in order to permit the submission of a formal written application for the relief orally requested. The defendant's former counsel withdrew from the case, and a new attorney was engaged. The motion was heard upon supporting and opposing affidavits, a transcript of the minutes of the hearing on plea before Judge Kaufman, and oral argument. It was denied and sentence was then imposed.

Rule 32(d) of the Federal Rules of Criminal Procedure, pursuant to which the motion was made, gives a defendant no absolute right to withdraw a plea of guilty. *Goo* v. *United States,* 9 Cir., 187 F. 2d 62, cert. den. 341 U. S. 916. Granting or denial of such a motion rests in the sound discretion of the trial court. *United States* v. *Harris,* 2 Cir.,

[1] During the discussion of this oral motion the appellant said: "Your Honor, in this case I am not guilty. I do not believe the Government has enough evidence to convict me. I would like to have a trial by jury. I was told by counsel that I did not have a chance to beat the case, that is why I pleaded guilty."

160 F. 2d 507; *United States* v. *Mignogna,* 2 Cir., 157 F. 2d 839, cert. den. 330 U. S. 830; *United States* v. *Colonna,* 3 Cir., 142 F. 2d 210; *Williams* v. *United States,* 5 Cir., 192 F. 2d 39. We are convinced that there was no abuse of discretion in denying the present motion. The appellant pleaded guilty with full knowledge of the nature of the charge against him and on the advice of competent counsel. Before accepting the plea Judge Kaufman was careful to make sure that the defendant was acting voluntarily and without the influence of fear or promises of a lighter sentence. There is no suggestion that he was ignorant of the consequences of his plea; indeed, he "was no stranger to proceedings in the criminal courts," and had previously pleaded guilty to other charges. The requirements set forth in *Kercheval* v. *United States,* 274 U. S. 220, relative to the exercise of discretion in refusing to permit the subsequent withdrawal of a guilty plea, are shown by the record to have been satisfied in the case at bar.

Nor was it error for Judge Ryan to hear the motion instead of referring it to Judge Kaufman. No request for such a transfer was made, and no reason existed for transferring it, for Judge Kaufman knew no more of the case than appeared in the undisputed minutes of the hearing at which the appellant pleaded guilty. Other alleged errors merit no discussion.

Judgment affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 518

VINCENZO PANEBIANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 56-58) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1953 (R. 58). The petition for a writ of certiorari was filed on December 31, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the trial court abused its discretion in denying petitioner's motion to withdraw his plea of guilty, which he previously entered after the case had been set for trial upon advice of competent counsel of his own choosing, voluntarily and without reliance on any promise.

RULE INVOLVED

Rule 32(d), F.R. Crim. P. provides:

> WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On April 29, 1953, petitioner was convicted, upon his plea of guilty (R. 21-23, 49-50), in the United States District Court for the Southern District of New York on count one of an indictment, which charged him, together with six other defendants, with conspiracy, under 18 U.S.C. 371, to violate the narcotics laws (26 U.S.C. 2553(a), 2554(a) and 21 U.S.C. 173, 174) (R. 10-12).[1] At the time of his plea, petitioner appeared with one Fruchtman, his attorney, before District Judge Kaufman (R. 21).

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[1] The indictment contained 12 additional counts relating to substantive narcotics offenses; but petitioner was not named in any of them (R. 13-20).

The following is a portion of the proceeding which took place (R. 22-23):

> Mr. FRUCHTMAN: If Your Honor please, at this time the defendant Vincenzo Panebianco desires to withdraw his plea of not guilty heretofore made and to plead guilty to the first count of the indictment of conspiracy.
>
> The COURT: Do you understand that?
>
> Defendant PANEBIANCO: Yes, sir.
>
> The COURT: You understand that?
>
> Defendant PANEBIANCO: Yes.
>
> The COURT: You do it wilfully?
>
> Defendant PANEBIANCO: Yes.
>
> The COURT: Without any promise or anything?
>
> Defendant PANEBIANCO: Yes.
>
> The COURT: All right, withdraw the plea of not guilty and enter the plea of guilty.

On June 15, 1953, the date set for sentence, petitioner's counsel, in an oral application for leave to allow petitioner to withdraw his plea, informed District Judge Ryan, who was then presiding, as follows (R. 36-37):

> Mr. FRUCHTMAN: The defendant informed me this morning and told me that he pleaded guilty but he is not guilty and wants permission to withdraw his plea of guilty that was heretofore entered.
>
> He insists that he is not guilty but that he did plead guilty because he thought that things were so-so and that he took my advice as to it because I told him that the witnesses were

> there against him and everything else. But he still insists that he is not guilty.

And petitioner made the following statement for the record (R. 39-40):

> Your Honor, in this case I am not guilty, I do not believe the Government has enough evidence to convict me. I would like to have a trial by jury. I was told by counsel that I did not have a chance to beat the case, that is why I pleaded guilty.

Judge Ryan adjourned the sentence "for the purpose", as he told petitioner, "of permitting you to make a formal application upon the papers, accompanied by such affidavits and other evidence as you desire to submit" (R. 38, 40).

On June 18, 1953, petitioner obtained, through one Singer, a substituted attorney, an order to show cause why he should not be allowed to withdraw his plea of guilty (R. 24-25, 27-28, 6). In the first of his two affidavits (R. 26-28, 35), which were the only documents submitted by petitioner in support of his motion, he averred, *inter alia,* as follows (R. 26-27):

> Prior to that time [pleading guilty], I had always maintained that I was "not guilty". I likewise maintained that the Government was not able to establish any conspiracy against me. I informed my attorney of these facts and he, however, told me that because of the nature of the charge against me, to wit, conspiracy to violate the narcotic laws, and because of the fact it was believed that several of the other

> defendants named in this indictment were to be witnesses against me that I "didn't stand much of a chance".
>
> Even though I believed that I was not guilty and that the Government could not establish any case against me I nevertheless, contrary to my own opinion, was finally prevailed upon to plead "Guilty" before Judge Kaufman * * *.

In the second affidavit, petitioner made, among others, the following averments (R. 35):

> 1. I am not guilty of the charge against me.
> 2. I entered the plea of "guilty" upon the mistaken belief concerning the law of conspiracy and upon the mistaken belief that mere talks with other defendants was sufficient to convict even though such talks were not concerning law violations by me.

The United States Attorney's affidavit (R. 30-34), filed in opposition to the motion, showed the following facts:

On November 15, 1952, an arrest warrant, based upon a complaint charging petitioner with a conspiracy to violate the narcotics law, was issued against him (R. 30). On December 8, 1952, petitioner, accompanied by his counsel Fruchtman, surrendered in New York City to the United States Attorney, who informed him of the charges against him (*ibid.*) He was arraigned before the United States Commissioner, who also informed him of the charges against him (R. 31). He was then released on bail (*ibid.*).

On January 30, 1953, the indictment was filed

against petitioner, and on February 11, 1953, he pleaded "not guilty" thereto before Judge Kaufman (*ibid.*). Following several continuances, Judge Kaufman, on April 28, 1953, set the case for trial on the following day (*ibid.*). On April 29, 1953, petitioner's counsel informed the Assistant United States Attorney in charge of the case, that petitioner "desired" to have his case "adjourned until the Fall Term at which time he would positively enter a plea of guilty" (*ibid.*). Government's counsel refused to consent to such adjournment, because all of its out-of-town witnesses were present and it was "prepared to go to trial immediately" (*ibid.*). Thereupon, petitioner entered his plea of guilty, which Judge Kaufman, after satisfying himself that it was voluntary and not based upon any promise, accepted in lieu of petitioner's prior plea of not guilty (R. 32). At the same time, all six of petitioner's codefendants pleaded guilty to count one and to their respective substantive counts (R. 32, 3-4). Petitioner's sentence was adjourned until June 15, 1953, "due to other commitments" of his attorney (R. 32). In the meantime, all the codefendants, except one who was in the custody of military authorities, were sentenced to imprisonment for various terms, ranging from two years to four years (R. 32, 4-5).[2]

The Government's principal objection to the motion was on the ground that it was "absolutely frivolous and entirely without merit" (R. 34). It

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[2] Execution of sentence of one of the codefendants was suspended, and he was placed on probation (R. 4).

reasoned, that since it considered petitioner to have been "the most important man in the conspiracy", and since his "lieutenant" received a term of four years, petitioner's motion, "obviously", was motivated by his feeling "that the sentence to be imposed upon him will be in the vicinity of four and one-half to five years and that he would receive no more by putting the Government to considerable inconvenience and expense in reassembling the necessary witnesses and conducting a trial and thereupon being found guilty" (R. 32-33). It also reasoned that "He might conceive that the Government would no longer be able to secure the testimony of one or more witnesses who may already have been persuaded to stand mute" (*ibid.*).

At the hearing on the motion, petitioner's counsel, without attempting to adduce any additional evidence, recapitulated most of the statements contained in the affidavits filed by petitioner and the Government (R. 41-48). Judge Ryan, after specifically inquiring concerning petitioner's criminal record, was informed that petitioner, in addition to several arrests, had been convicted of third degree assault in 1937, when 17 years of age; of a violation of N.Y. Penal Law §§ 722 and 1897 in 1938; and "for a dancehall fight" (R. 43-44). Petitioner's counsel himself volunteered the information as to the last conviction (R. 44). Thereupon the judge made the following findings (R. 45):

> The defendant was no stranger to proceedings in the criminal courts. He was represented by experienced counsel. He took this

> plea at the time it was sent out to a judge to try the case. He knew what he was doing, and I believe his application now is not made in good faith and has no merit. * * *
>
> * * * * *
>
> The defendant plead guilty under circumstances which convince me he knew what he was doing, and the application now to withdraw his plea is not made in good faith, but prompted by motives which come from a realization that if he were allowed to withdraw his plea previously entered, the Government's case would be prejudiced. * * *

The judge denied the motion, and sentenced petitioner to four years' imprisonment and a $10,000 fine (R. 45, 48, 49-50). On appeal, the Court of Appeals for the Second Circuit, being "convinced that there was no abuse of discretion", affirmed, *per curiam,* the order denying the motion (R. 57, 58).

ARGUMENT

1. It is clear from the statement, *supra,* that petitioner's contention (Pet. 9-16), that the trial court abused its discretion in denying his motion for leave to withdraw his plea of guilty, is without merit. The law is well settled that petitioner had the burden of showing that his plea was entered in justifiable ignorance of his rights or the consequences of his action, or was the result of fear, coercion, fraud, mistake or inadvertence. *Kercheval* v. *United States,* 274 U.S. 220, 224; *Friedman* v. *United States,* 200 F. 2d 690, 696 (C.A. 8), cer-

tiorai denied, 345 U.S. 926; *United States* v. *Shneer,* 194 F. 2d 598, 600 (C.A. 3); *Williams* v. *United States,* 192 F. 2d 39, 40 (C.A. 5).[3]

Petitioner has shown no such circumstances. He does not dispute that his plea of guilty before Judge Kaufman was, as the record shows, voluntarily made without reliance upon any promise. His claim (Pet. 11-12), that it was motivated by his ignorance of the nature of the charge against him and the proof required to convict him, is unsupported. Petitioner was represented at all proceedings, from the time he surrendered in obedience to an arrest warrant to the time of his first unsuccessful attempt to withdraw his guilty plea, by a personally selected counsel, whose competency the trial court recognized and petitioner does not challenge. Petitioner has submitted no affidavit from such counsel, nor offered at the hearing any testimony of such counsel, concerning the nature of the legal advice given petitioner with respect to the charge against him.[4]

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[3] The fact that his motion was made before sentence had been imposed did not give him any greater right to a withdrawal of his plea. See *Williams* v. *United States,* 192 F. 2d 39 (C.A. 5); *Goo* v. *United States,* 187 F. 2d 62 (C.A. 9), certiorari denied, 341 U.S. 916; *United States* v. *Colonna,* 142 F. 2d 210 (C.A. 3).

[4] Petitioner's contention (Pet. 13-15), that Judge Ryan denied him a hearing on his motion, is without substance. In adjourning petitioner's sentence on June 15, 1953, in order to permit him to make a formal application for a withdrawal of his plea, Judge Ryan specifically told petitioner that his application could be "accompanied by such affidavits and other evidence as you desire to submit." (R. 38) It seems that the only persons having knowledge of the relevant facts were petitioner himself and his original counsel, Fruchtman. However,

It is reasonable to infer that Fruchtman, after a candid discussion with petitioner of the facts and the applicable law in the light of the charge against him, concluded that petitioner was guilty and in good faith advised him so to plead.[5] That petitioner knew the nature of the charge appears from petitioner's own statement (R. 26-27) that Fruchtman advised him "that because of the nature of the charge against me" and because of the belief that some of the codefendants "were to be witnesses against me that 'I didn't stand much of a chance' " of acquittal.[6] See *Friedman* v. *United States,* 200 F. 2d 690, 697 (C.A. 8), certiorari denied, 345 U.S. 926; *United States* v. *Shneer,* 194 F. 2d 598, 601 (C.A. 3); cf. *United States* v. *Mignogna,* 157 F. 2d 839 (C.A. 2), certiorari denied, 330 U.S. 830.

Petitioner's claim of innocence was belated. As Judge Ryan observed (R. 43), the guilty plea was not entered "in the hurried routine * * * of the calendar part", but rather three months after indictment just when the trial was about to begin in

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at the hearing on the return of the motion, petitioner did not seek to offer Frutchman as a witness, or to submit an affidavit from him. Nor did he seek to testify in his own behalf, relying on his two affidavits. Thus, petitioner cannot now be heard to complain that he was not accorded his full procedural rights.

[5] In *Bergen* v. *United States,* 145 F. 2d 181 (C.A. 8), upon which petitioner relies (Pet. 12) in support of his contention that he misunderstood the nature of the charge, the defendant had no advice of counsel so that his misinterpretation of the indictment was excusable.

[6] Petitioner's claim (Pet. 12), that such advice produced in him a fear of inevitable conviction which overcame his personal belief in his innocence and induced him to enter his plea of guilty, is absurd. It is illogical that one, who is fearful of the consequences of a criminal conviction would help bring about such consequences by his plea of guilty.

the trial part of the court. It is to be noted that Fruchtman stated to Judge Ryan, on the date set for sentence, that petitioner informed him, "this morning * * * that he pleaded guilty but he is not guilty and wants permission to withdraw his plea" (R. 36-37). It is significant that such a statement was made after all the co-defendants had been sentenced upon their pleas of guilty. The mere allegation of innocence by a defendant does not entitle him to a withdrawal of his plea of guilty, for otherwise any defendant could insist upon a withdrawal of such plea, as a matter of right, merely by asserting his innocence prior to sentence. Cf. *United States* v. *Harris,* 160 F. 2d 507 (C.A. 2).

Thus, from the totality of the factors involved, it is clear that there was sufficient evidence to support Judge Ryan's conclusion (R. 45),[7] that petitioner's plea of guilty was knowingly made and that the application for withdrawal was not in good faith and that the granting thereof would prejudice the government. There can be no substantial question based upon a claim of abuse of discretion. See *Stidham* v. *United States,* 170 F. 2d 294 (C.A. 8); *Katz* v. *United States,* 161 F. 2d

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[7] Since guilt or innocence is not a proper issue upon a motion to withdraw a plea of guilty (*Kercheval* v. *United States,* 274 U.S. 220, 224; *Friedman* v. *United States,* 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U.S. 926), it was not improper for Judge Ryan to ascertain petitioner's criminal record solely for the purpose of determining whether he was acquainted with court procedure. Indeed, petitioner cannot now object (Pet. 13, 14) thereto, especially since his counsel did not object to such information at the time it was sought, but rather contributed to it.

869 (C.A. 6), certiorari denied, 332 U.S. 846; *United States* v. *Mignogna*, 157 F. 2d 839 (C.A. 2), certiorari denied, 330 U.S. 830; *United States* v. *Fox*, 130 F. 2d 56 (C.A. 3), certiorari denied, 317 U.S. 666.[8] Petitioner's contention (Pet. 16-19), that the denial of his application deprived him of his constitutional right to a jury trial, is specious. Having voluntarily, advisedly and intelligently pleaded guilty, he competently and effectively waived his right to a jury trial. See *United States* v. *Colonna*, 142 F. 2d 210, 213 (C.A. 3).

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[8] Petitioner's contention (Pet. 14-15), that Judge Ryan erred in failing to review the proceedings before Judge Kaufman, who, according to petitioner, by accepting his plea of guilty without ascertaining whether it was made with petitioner's "understanding of the nature of the charge", violated Rule 11 of the F. R. of Crim. P., is without merit. Petitioner did not challenge on his motion the validity of the proceeding before Judge Kaufman; he based his motion for the withdrawal of his plea on grounds that he was misled by his counsel. As appears from the Statement, the proceeding before Judge Kaufman did not deny petitioner any procedural rights. Judge Kaufman was not required, before accepting petitioner's plea of guilty, to inquire into the facts upon which the charge was founded, since petitioner was represented by competent counsel and the indictment clearly charged him with a conspiracy to violate the narcotics law. Cf. *United States* v. *Colonna*, 142 F. 2d 210, 212 (C.A. 3).

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question warranting further review by this Court. It is therefore respectfully submitted that the petition should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
EDWARD SZUKELEWICZ,
Attorneys.

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